DATO' H. L. WRIGGLESWORTH

v.

HAJI ZAKARIA BIN YUSOFF

HIGH COURT MALAYA, KOTA BHARU
TUAN IDRIS BIN YUSOFF J
[CIVIL SUIT NO. 22-98-91]
21 JANUARY 1995

ADVOCATES & SOLICITORS*: Solicitor and client - Bills delivered - Claim for fees and party to party costs - No written agreement pursuant to s. 116(1) Legal Professsion Act 1976 - Whether written agreement mandatory - Whether claim defective - Option for detailed or gross sum bill under s. 121 - Whether bills fair and reasonable - Bills presumed bona fide once delivered under s. 124(2) - Whether presumption rebutted by defendant - Whether Court estopped from scrutinizing bills at present stage - Whether plaintiff entitled to interest.*

The plaintiff acted for the defendant in several matters and sued the defendant for non-payment of three bills numbers 0723, 0726 and 0727 delivered to the defendant and for party and party costs that were taxed and allowed in connection with the matters. No written agreements were made between the parties respecting the amount of the payment of solicitor's costs pursuant to s. 116(1) of the Legal Profession Act 1976 (the Act).

The defendant did not dispute bill no. 0726 but Counsel for the defendant contended that bill no. 0723 was unfair and unreasonable as it contained an extraordinary charge of RM2,000 for "studying and discussing writ and statement of claim with two Kuala Lumpur lawyers". He argued that on the face of the bills, it must appear not only reasonable but contain no extraordinary charges. The defendant's Counsel also argued that the third bill no. 0727 was unlawful and by virtue of s. 124(2) of the Act, the Court was not estopped from scrutinizing the bill to ensure that it was a bill "*bona fide* complying with the Act". Counsel contended that the absence of the written agreement ran counter to the provisions of s. 121 of the Act and thus "the contrary" has sufficiently been shown for the purpose of rebutting the presumption that bill no. 0727 was a *bona fide* bill. Counsel further argued that the claim for party to party costs, purportedly made pursuant to an agreement, was not sustainable in the absence of a written agreement in view of s. 116(1) of the Act.

The plaintiff conceded that the discussion with the two lawyers should never have been entered in bill no. 0723 but he stressed that the detailed bill showed there were numerous other matters attended to by him which made the claim fair and reasonable. The plaintiff contended that the claim for party to party costs was substantiated by a letter dated 2 February 1988 written by the defendant to the plaintiff whereby the defendant undertook to settle his legal expenses directly with his lawyer. The plaintiff also argued that the non-existence of a written agreement did not render the claim defective as the usage of the word "may" in s. 116 of the Act did not make it mandatory for a solicitor to prepare a written agreement. The plaintiff further claimed entitlement to interest from the date of submission to realisation.

Held:

[1] Section 116 is not a mandatory provision requiring the agreement to be reduced to writing - it merely says that the solicitor may make an agreement in writing and to make it binding, the client is required to sign it. If, however, the agreement is not reduced to writing, it does not totally shut out the solicitor from claiming his costs for he can still fall back on s. 121(1).

In so doing the onus of proving that the costs are fair and reasonable is on him unless it is a gross sum bill. The avenues as created by s. 121(1) give the solicitor the right of option whether to present a bill containing detailed items or a gross sum bill.

[2] The plaintiff has explained at great length as to how he arrived at the figure RM22,136.06 as party to party costs whereas the defendant has not advanced any argument at all to contradict the figures claimed but merely rests its case on the failure of the plaintiff to produce a written agreement. With respect, the Court disagrees with the defendant's reasons and hold that the plaintiff has shown justification for party to party costs which claim is allowed.

[3] Having gone through bill no. 0723, the plaintiff is not to be deprived of any payment at all. Hence the bill is reduced by RM1,500 leaving a sum of RM1,326 only.

[4] Part VIII of the Act governs and regulates the remuneration of a solicitor and the effect of Part VIII is not intended to confer on the solicitor a general authority - *carte blanche* - to claim any amount he likes. The significance of s. 124 is to enable the Court to consider and evaluate the propriety or otherwise of the claim even at that late stage apart from shifting the burden of proof which instead of the party asserting the affirmative, now rests upon the other party to show the contrary.

[5] The fact that no signed written agreement was made does not disentitle the plaintiff from making the claim and since the defendant has in law failed to show the contrary, the claim by the plaintiff for RM10,000 as agreed retainer fee is deemed unchallenged and consequently, bill no. 0727 is allowed.

[6] On the question of interest, the Court agrees that the plaintiff is entitled to it since the law in this respect is settled. Having regard to all the circumstances, the Court allows payment of interest to run from the date of judgment to realisation and for the party to party taxed costs effective from their respective dates of judgment to realisation.

[Judgment entered for the plaintiff in the sum of RM20,091.10 plus interest at 8% per annum from date of judgment to realisation and RM22,136.06 for party to party costs plus interest at 8% per annum from their respective dates of judgment to realisation].

Cases referred to:
Siew Kuen Williams v. Yong Siew [1984]1 MLJ 95 ***(refd)***
Syarikat Gam Bee & Sons Trading & Constructions v. Joseph Au Keng Weng [1990] 2 MLJ 234 ***(refd)***
Vije & Co. v. Cooperative Central Bank Ltd. [1991] 2 CLJ 1406 ***(refd)***
Cole v. Park [1889] 41 CHD 326 ***(refd)***

Legislation referred to:
Legal Profession Act, 1976, ss. 112, 116, 116(1) & (2), 117, 121, 121(1) & 124

For the plaintiff - H.L. Wrigglesworth; M/s. Wrigglesworth & Co.
For the defendant - Hj Mokhtar b Mohamad; M/s. Mokhtar & Co.

JUDGMENT

Idris bin Yusoff J:

The plaintiff who had for a number of years been acting as the solicitor for the defendant in several matters including Kuala Terengganu High Court Civil Suit Nos. 22 and 63 of 1980, Supreme Court of Malaysia Civil Appeal No. 3 of 1981, Supreme Court of Malaysia Civil Application No. 1 of 1985, Kuala Terengganu High Court Bankruptcy No. 43-161-86 and Kuala Lumpur High Court Suit No. 23-5-86, all of which was between the defendant and one Marina

bt Yusoff is suing the defendant for payment of three bills bearing serial numbers 0723, 0726 and 0727 that had been delivered to the latter and also for party and party costs that were taxed and allowed in connection with the above matters.

At the outset of the hearing, both parties agreed that oral evidence be dispensed with and that they be allowed to put in written submissions based on the Agreed Bundle of Documents (ABD). However if the need arises both parties would be at liberty to furnish oral evidence.

It is common ground that in respect of these matters no written agreements were made between the plaintiff and the defendant respecting the amount and the manner of payment for the whole or any part of the solicitor's costs as envisaged in s. 116(1) of the Legal Profession Act 1976 (the Act).

Section 116(1) of the Act says:

> 116.(1) Subject to the provisions of any written law, an advocate and solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to be done by such advocate and solicitor, either by a gross sum, or otherwise, and either at the same rate or at a greater or lesser rate than the rate at which he would otherwise be entitled to be remunerated.

By virtue of sub-section (2), the agreement will be binding on the client upon it being signed by him while s. 117 sets out the advantages and disadvantages of having such an agreement.

Section 121 explains the position where the remuneration of an advocate and solicitor is not the subject of an agreement, the solicitor's bill of costs may at the option of the advocate and solicitor either contain detailed items or be for a gross sum and the proviso thereto clarifies that at any time before service upon him of a writ or other originating process for the recovery of costs included in a gross sum bill and before the expiration of three months from the date of the delivery to him of the bill, the party chargeable (the client) may require the advocate and solicitor to delivery to him in lieu of the cost a bill containing detailed items and on such requirement the gross sum bill shall thereupon be of no effect - see proviso (a). In *Siew Kuen Williams v. Yong Siew* [1984] 1 MLJ 95, *Syarikat Gam Bee & Sons Trading & Constructions v. Joseph Au Keng Weng* [1990] 2 MLJ 234 and *Vije & Co. v. Cooperative Central Bank Ltd.* [1991] 2 CLJ 1406, the Court held that a lump sum bill if not objected to within the specified time will be conclusive against the client. Of all the said three cases Counsel for the defendant strongly relies on *Syarikat Gam Bee's* case as according to him it "represents a truer and fairer state of the law" since it appears in that case that there ought to be satisfied "a second requirement" i.e., that the bill on the face of it must appear not only reasonable but must contain no extraordinary charges. This is because the learned Judge in that case relying on *Cole v. Park* [1889] 41 CHD 326 and after considering the circumstances prevailing in the case said "... at no time before this, had the petitioner (the client) shown that the bill had been unfair and unreasonable".

It is also conceded by Counsel for the defendant that since there was no request from the defendant for delivery of itemised bills, the three bills concerned can be categorised as gross sum bills.

Counsel for the defendant argues that the claim for party and party costs is made supposedly pursuant to an agreement made by the defendant. He stresses that if there is such an agreement it should be in writing and consequently signed by the defendant as contemplated by s. 116 of the Act. In the absence of such written agreement the claim would be unsustainable and he accordingly urges the Court to dismiss it. He adds that the dismissal of such claim does not give rise to any injustice to the plaintiff as the latter had already

been paid as retainer fee, a sum of RM3,000 apart from the additional sum of RM10,000 which was deducted from the defendant's account "in consideration of payment for the great amount of extra work ... and the vast amount of trouble and embarrassment ... caused ...". (See p. 32, para. 3 of ABD).

The plaintiff contends that the claim for party and party costs is substantiated by a letter dated 2 February 1988 (p. 90 of ABD) written by the defendant to Marina bt Mohd. Yusoff, the effect of which evinces an undertaking by the defendant to settle direct with his lawyer all his legal expenses.

The plaintiff also argues that the non-existence of a written agreement does not render the claim defective or unsustainable for s. 116 of the Act does not make it mandatory for the solicitor to prepare a written agreement since the word used in that section is "may". He therefore disagrees with the contention of Counsel for the defendant that "the wordings in s. 116 of the Legal Profession Act compels the solicitor to reduce any agreement for his remuneration into writing and to get the client to sign such agreement."

To my mind the wordings of s. 116 are clear. Section 116 is not a mandatory provision requiring the agreement to be reduced to writing - it merely says that the solicitor may make an agreement in writing and to make it binding, the client is required to sign it. If, however, for some reasons the agreement is not reduced to writing, it does not totally shut out the solicitor from claiming his costs for he can still fall back on s. 121(1). In so doing the onus of proving that the costs are fair and reasonable, as usual, is on him unless it is a gross sum bill. He cannot avail himself of whatever benefits conferred by s. 117. The avenues as created by s. 121(1) give the solicitor the right of option, whether to present a bill containing detailed items or a gross sum bill.

The plaintiff has explained at great length as to how he arrived at the figure RM22,136.06 as party and party costs. This total sum comprises the order made on 17 June 1985 for RM200 (p. 92 of ABD), the allocator dated 3 December 1985 and the fee totalling RM1752.60 (p. 53 of ABD), the allocator dated dated 4 December 1985 together with the fee all totalling RM2,433.95 (p. 54 of ABD) and the allocator dated 13 October 1985 plus the fee all totalling RM17,749.51 (p. 52 of ABD). On the other hand the defendant has not advanced any argument at all to contradict the figures or dispute as to the existence of an agreement to pay the party and party costs as claimed, but merely rests its case on the fact that the failure of the plaintiff to produce a written agreement would result in his disentitlement to the claim. With respect, I disagree with the defendant for reasons stated in the preceding paragraph.

I think I might as well pause here to make some observations regarding the RM10,000 which is admittedly retained by the plaintiff but with the knowledge and consent of the defendant. The plaintiff's version is that the RM10,000 has nothing to do with the retainer fee or the costs awarded against Marina bt Yusoff. From the various documents in ABD it is clear that this RM10,000 arose out of the interest paid on a sum of RM136,666.28 placed on deposit account with Bank Bumiputra Malaysia Berhad Kuala Terengganu Branch. The sum of RM136,666.28 represented the balance of the purchase price for the 1/3 share of Lot No. 1233 Mukim Batu Burok, Kuala Terengganu that the defendant purchased from Marina bt Yusoff. The said sum was paid by the subsequent purchasers to their solicitors Messrs. Wan Abdul Mutallib & Co. with instruction not to release the money until the Court decided whether this sum should go to the defendant or to Marina bt Yusoff.

Pending the Court's decision both the plaintiff and Messrs. Wan Abdul Mutallib & Co. agreed to place the said sum on deposit account. The Court's decision was made known on 28 April 1984 which was in favour of the defendant. By then the total amount of interest accrued was about RM51,322.56, of which half was set aside for Messrs. Wan Abdul Mutallib & Co. while the other half together with the sum of RM136,666.28 was paid to the plaintiff by the bank. And it was from this sum that RM10,000 was retained by the plaintiff as heretofore agreed by the defendant. The sum of RM10,000 is reflected at item 5 in List C exhibited by the plaintiff (the total sum is shown as RM13,012.70 - the sum of RM3,012.70 was for other miscellaneous payments). It is further argued by the plaintiff that legally the whole accrued interest could have been retained by both Counsels but taking into consideration some other pressing factors the plaintiff, as an act of fairness, decided to allow the defendant to retain the portion of interest that had been paid to him. In any event, as pointed out by the plaintiff, he is not pursuing this issue and is, therefore, purposely left out of the pleading.

In view of the foregoing, I hold that the plaintiff has shown justification in his claim for party and party costs and I accordingly allow the claim.

Going back to the three bills delivered by the plaintiff, Counsel for the defendant does not dispute Bill No. 0726 and accordingly the claim for RM7,496.70 is allowed.

As regards Bill No. 0723 Counsel for the defendant considers it unfair or unreasonable as it contains an extraordinary charge of RM2,000 for "studying and discussing writ and statement of claim with two Kuala Lumpur lawyers". It is unreasonable as Counsel puts it that only the plaintiff was engaged to represent the defendant and the discussion with two Kuala Lumpur lawyers was not within the scope of his appointment as such. With respect I agree with Counsel's contention and what is more even the plaintiff himself concedes that the discussion with the two lawyers in Kuala Lumpur should have never been entered in the bill and therefore should be ignored. Be all this as it may, the plaintiff stresses that the detailed bill shows that there were numerous other matters being attended to by him which make the claim for RM2,826.60 including disbursements, fair and reasonable. Having gone through the said bill and after considering the plaintiff's submission on this aspect of the claim, I agree that the plaintiff is not to be deprived of any payment at all and that I consider a sum of RM500 (as was suggested by Counsel for the defendant) be allowed - hence the bill is reduced by RM1,500 leaving a sum of RM1,326 only.

The last bill is Bill No. 0727 which is disputed by Counsel for the defendant as being unlawful. Counsel refers to s. 124(2) of the Act which says:

> 124(2) Where a bill is proved to have been delivered in compliance with subsection (1) it shall not be necessary in the first instance for the advocate and solicitor to prove the contents of the bill and it shall be presumed until the contrary is shown to be a bill *bona fide* complying with this Act.

It seems that Counsel does not deny that there was due compliance with subsection (1) of s. 124 by the plaintiff but he maintains that by virtue of subsection (2) the Court at this stage is not estopped from scrutinizing the bill to ensure that it is a bill "*bona fide* complying with the Act".

I must say that I agree with such interpretation. Part VIII of the Act governs and regulates the remuneration of a solicitor and as I see it the effect of the said Part VIII is not intended to confer on the solicitor a general authority - a *carte blanche* - to put in any claim for any amount he likes. And it would further be observed that the significance of sub-section (2) of

s. 124 is to enable the Court to consider and evaluate the propriety or otherwise of the claim even at that late stage apart from denoting a shifting or reversal of the burden of proof, which instead of putting such burden on the party asserting the affirmative, it now rests upon the other party to show the contrary. In fact it is my belief that what was referred to as "a second requirement" by Counsel for the defendant must be the scope of s. 124(2) of the Act.

Can it then be said that the defendant has succeeded in discharging that burden? As can be seen the defendant is relying heavily on the absence of a signed written agreement. Counsel for the defendant contends that the absence of such an agreement runs counter to the provisions of s. 121 of the Act and thus "the contrary" has sufficiently been shown for the purpose of rebutting the presumption that Bill No. 0727 is a *bona fide* bill.

He goes on to say that the plaintiff by including "a charge not allowed by law... the Bill is not a *bona fide* Bill as it is assisting an attempt to circumvent what the law does not allow".

As I have held earlier the fact that no signed written agreement was made does not disentitle the plaintiff from making the claim and since the defendant has to my mind, in law, failed to show the contrary, the claim by the plaintiff for RM10,000 as agreed retainer fee is deemed to remain unchallenged and consequently Bill No. 0727 is allowed.

On the question of interest the Court agrees that the plaintiff is entitled to it since the law in this respect is settled. The authorities show that the object of awarding interest "is not to compensate a successful party for any damage done but for him being kept out of his money". However, the plaintiff has indicated to the Court that he is not claiming interest for the whole period in respect of the total amount in the three bills but only for the period from the date of his submissions to the date of realisation; but the Court having regard to all the circumstances allows payment of such interest to run from the date of judgment to the date of realisation and for the party and party taxed costs effective from their respective dates of judgment to the dates of realisation.

Accordingly I enter judgment for the plaintiff as follows:

a) a sum of RM20,091.10 as represented by the three Bills Nos. 0723, 0726 and 0727 plus interest at 8% per annum from the date of judgment to the date of realisation;

b) a sum of RM22,136.06 being payment of the party and party taxed costs plus interest at 8% per annum from their respective dates of judgment to the dates of realisation.

c) Costs of the suit.